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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO JESUS PENA

Defendant and Appellant.

G056070

(Super. Ct. No. 10NF0523)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Conditionally reversed and remanded.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted Gilberto Jesus Pena of five counts, including street terrorism, and found true gang and other enhancements. Pena appealed. In *People v. Pena* (Aug. 29, 2017, G053303) [nonpub. opn.] (*Pena*), this court held there was insufficient evidence the alleged gang was a criminal street gang as statutorily defined.¹ We reversed the conviction for street terrorism (Pen. Code, § 186.22, subd. (a)), and the street terrorism enhancements (Pen. Code, § 186.22, subd. (b)(1)). We remanded the case for resentencing. (*Pena, supra*, G053303.) At the resentencing hearing, the trial court sentenced Pena to serve a total of 25 years to life in prison with a minimum of seven years. Pena appeals from this judgment.

We appointed counsel to represent Pena on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against her client but advised the court she found no issues to argue on Pena's behalf.

Counsel filed a brief following the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). The court in *Wende* explained a *Wende* brief is one that sets forth a summary of proceedings and facts but raises no specific issues. Under these circumstances, the court must conduct an independent review of the entire record. When the appellant himself raises specific issues in a *Wende* proceeding, we must expressly address them in our opinion and explain why they fail. (*People v. Kelly* (2006) 40 Cal.4th 106, 110, 120, 124.)

Counsel did not provide this court with any information as to issues that might arguably support an appeal pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We gave Pena 30 days to file written argument on his own behalf. That time has passed, and Pena has not filed any written argument. In *People v. Pena* (Nov. 19,

¹ A full recitation of the underling facts may be found in *Pena, supra*, G053303.

2018, G056070) [nonpub. opn.], we reviewed the record in accordance with our obligations under *Wende*, found no arguable issues on appeal, and affirmed the judgment.

Pena filed a petition for review with the California Supreme Court. In his petition, he argued, for the first time, he was entitled to relief pursuant to Proposition 57. The Supreme Court granted review and transferred the matter back to this court with directions to vacate our decision, which we now do, and reconsider the matter in light of *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299. (*People v. Pena*, review granted Mar. 13, 2019, S253583.)

Pena timely filed a supplemental brief arguing he was entitled to a juvenile transfer hearing pursuant to Proposition 57. (Cal. Rules of Court, rule 8.200(b)(1).) The Attorney General did not file a responding brief. (Cal. Rules of Court, rule 8.200(b)(1).) Because we vacate our opinion in *Pena, supra*, G056070 consistent with the Supreme Court's order, we now consider both the *Wende* proceeding and the applicability of Proposition 57.

FACTS

On remand after we decided *Pena, supra*, G053303, the trial court sentenced Pena to 25 years to life for conspiracy to commit murder, three years for assault with a deadly weapon (stayed), seven years to life for attempted murder with premeditation (concurrent),² and three years for assault with a deadly weapon count (stayed). The total sentence was 25 years to life with a minimum of seven years.

Upon review of the abstract of judgment issued after resentencing, appellate counsel noted two clerical errors. In a letter to the trial court, counsel requested correction of those errors and issuance of a revised abstract of judgment. In response, the

² The prosecution argued the sentences for conspiracy to commit murder and attempted murder with premeditation should be imposed as consecutive sentences. The court rejected that argument and ordered the sentences be served concurrently.

trial court ordered correction of the errors and issued a revised abstract of judgment reflecting the corrections.

DISCUSSION

I. Wende & Anders

A review of the record of resentencing pursuant to *Wende, supra*, 25 Cal.3d 436, and *Anders, supra*, 386 U.S. 738, has disclosed no reasonably arguable appellate issue.

II. Proposition 57

Pena argues he was entitled to a juvenile transfer hearing pursuant to Proposition 57. The Attorney General does not dispute Pena is entitled to this relief.

At the time Pena was charged and tried, California law permitted a district attorney, for certain offenses, to file a case against a juvenile 14 years of age or older directly in adult court. (Former Welf. & Inst. Code, § 707, subd. (d), repealed by Prop. 57, § 4.2, as approved by voters Gen. Elect. (Nov. 8, 2016), eff. Nov. 9, 2016; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1105 (*Vela*)). Proposition 57 amended this statute to eliminate direct filing by prosecutors and require the juvenile court to conduct a transfer hearing to determine a minor's suitability for juvenile court. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305-306 (*Lara*); former Welf. & Inst. Code, § 707.) This provision applied retroactively to minors whose judgments were not yet final on appeal. (*Lara, supra*, 4 Cal.5th at pp. 303-304, 309-314.)

Here, Pena was 17 years old, a minor, when he committed these crimes. The prosecution directly charged him in adult court in November 2013. His case was pending when Proposition 57 took effect in November 2016. Thus, Pena is entitled to a transfer hearing in juvenile court. We transfer the matter for further proceedings in the juvenile court.

““When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the defendant’s] cause to a court of criminal jurisdiction. ([Welf. & Inst. Code] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the defendant] to a court of criminal jurisdiction because he is “not a fit and proper subject to be dealt with under the juvenile court law,” then [the defendant’s] convictions and sentence are to be reinstated. ([Welf. & Inst. Code] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [the defendant] to a court of criminal jurisdiction, then it shall treat [the defendant’s] convictions as juvenile adjudications and impose an appropriate “disposition” within its discretion.’ [Citation.]” (*Lara, supra*, 4 Cal.5th at p. 310.)

DISPOSITION

The convictions and sentence are conditionally reversed and remanded to the juvenile court with directions to conduct a juvenile transfer hearing consistent with this opinion. (Welf. & Inst. Code, § 707.)

O’LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.